

PARADOXES OF THE DEEP STATE

JACK GOLDSMITH

In April 1955, at the height of the Red Scare, University of Chicago political scientist Hans Morgenthau wrote an essay about the State Department's implementation of a 1953 order by President Dwight Eisenhower on security requirements for government employment.¹ That document, Executive Order 10450, fulfilled Eisenhower's campaign pledge to enhance security and loyalty in the department, an issue that had been the main focus of Senator Joseph McCarthy's anticommunist diatribes.² It required that "all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character," and should demonstrate an "unswerving loyalty to the United States." The Bureau of Security and Consular Affairs, run by McCarthy protégé Scott McLeod, enforced E.O. 10450 in the State Department. It purged several hundred State Department employees for

suspected Communist sympathies and hundreds more on suspicion of homosexuality.

Morgenthau decried the “persistent rumors” that the Bureau of Security deployed “tapped telephones, hidden microphones, steamed-open letters, special rooms and devices” against those suspected of disloyalty or bad character. Though Morgenthau did not know if the rumors were true (they largely were), he noted that their plausibility testified to “a spirit vastly different from that which is supposed to prevail in an agency of democratic government.” Morgenthau argued that the Bureau’s secret intelligence collection, combined with its power to condemn on the basis of that intelligence, enhanced its control over the operations and policies of the Department of State at the expense of the secretary of state and other senior political appointees. He described this phenomenon as “the dual state.” The characteristic of the dual state, he maintained, is that “as a matter of law, the power of making decisions remains with the authorities charged by law with making them,” while “as a matter of fact,” the “agents of the secret police” can “at the very least exert an effective veto over the decisions.”³

Morgenthau’s “dual state” was a forerunner to an American “Deep State” consisting of national security bureaucrats who use secretly collected information to shape or check the actions of elected officials. Some see these American bureaucrats as a vital check on the law-breaking or authoritarian or otherwise illegitimate tendencies of democratically elected officials. Others decry it as a self-serving authoritarian cabal that illegally and illegitimately

undermines democratically elected officials and the policies they were elected to implement. The truth is that the Deep State, which is a real phenomenon, has long been both a threat to democratic politics and a savior of it. The problem is that it is hard to maintain its savior role without also accepting its threatening role. The two go hand in hand, and are difficult to untangle. This essay seeks to explain these propositions through a study of Deep State leaks.

“DEEP STATE” IS A TERM USED MOST PROMINENTLY TO DESCRIBE cross-institutional clandestine forces in authoritarian states, including current and retired military and intelligence officials, that act to preserve certain national values when they are threatened by elected leaders. In Turkey, notoriously, the *derin devlet* has long used coups, assassinations, riots, and other forms of violence to preserve secular and anticommunist values.⁴ Similar forces exist in Egypt and Pakistan.⁵

What I will call the “Deep State” in the United States is not nearly as sinister as in authoritarian countries. We don’t have coups, or tanks in the street, or the like. But a Deep State exists here and has for at least a century posed dangers to US constitutional democracy. The term is used in many different ways, often with negative connotations. To minimize confusion and focus the analysis, I will define *Deep State* narrowly and neutrally as the *US intelligence and related national security bureaucracies endowed with extraordinary powers of secret intelligence collection (or access to the fruits of that intelligence)*.⁶ (For present purposes, I have in

mind primarily the Federal Bureau of Investigation, the National Security Agency, and the National Security Council.)

The Deep State so defined isn't an organized conspiracy or a formal entity that hands out membership cards. It is, rather, a metaphor for a national security bureaucracy that is "deep" in at least three senses. First, it collects intelligence and more generally operates in secret, protected by rules of classified information enforced through criminal and other sanctions. Second, it is entrenched by civil-service protection. Third, it has a general outlook and interests that persist across presidential administrations and that sometimes clash with an administration's outlook and interests.

The Deep State traces its origins to the establishment of the FBI in the 1930s, and it grew significantly with the National Security Act of 1947 (which created the CIA) and the formal creation by President Truman of the NSA in 1952.⁷ From the beginning these agencies were controversial because they were hard to square with the ideals of democratic government. In a democracy, governmental action is presumptively open, subject to public criticism, analysis, and review in the press and by elected representatives and civil society and by courts, and ultimately subject to electoral check. Many worried that secret intelligence agencies, acting out of public sight, would abuse their intelligence collection and especially their electronic surveillance powers. In the 1950s, 1960s, and 1970s, this is exactly what happened.

The abuses during this period fell into two baskets. The first, which I'll call *political abuse*, involved the Deep State carrying out (or at least acting consistent with) the wishes

of its political superiors to spy on and engage in operations against disfavored Americans or for political ends. FBI Director J. Edgar Hoover—at the direction of, or at least with the acquiescence of, presidents and attorneys general—used legally dubious wiretaps, bugs, break-ins, letter-openings, and the like to collect information about suspected communists, political dissidents, antiwar protesters, left-wing student groups, and others who engaged in “subversive” activities.⁸ The NSA assisted these efforts by secretly collecting many millions of international communications of Americans on “watch lists” for suspected subversion. The FBI used the fruits of secret intelligence to covertly disrupt and discredit the activities of disfavored groups, including by surreptitiously destroying (or threatening to destroy) marriages, friendships, and job prospects. Martin Luther King, Jr. is the most prominent example but far from the only one. In addition, every presidential administration from FDR through Nixon used the Deep State to collect political intelligence on potential rivals.⁹

The second type of abuse, which I’ll call *sabotage*, occurred when the Deep State used secret intelligence opportunistically to further its institutional interests at the expense of or contrary to elected officials, sometimes to influence policy.¹⁰ The key move here was to leak or threaten to leak secretly collected information to achieve a political end.¹¹ Hoover is the great (but not the only) example. He secretly collected and maintained compromising information about executive officials, members of Congress, and their friends and family, which he would share in ways

that enhanced his power and influence over the elected official. “The moment [Hoover] would get something on a senator, he’d send one of the errand boys up and advise the senator that ‘we’re in the course of an investigation, and we by chance happened to come up with this data on your daughter,’” says William Sullivan, who led the FBI’s domestic intelligence division under Hoover. “From that time on, the senator’s right in his pocket.”¹² For decades politicians feared Hoover would collect and leak such information, and tended to give him what he wanted and not to cross him.¹³ The FBI also covertly leaked its political intelligence to the news media in order “to influence social policy and political action” in accord with its preferences, the Church Committee, a Senate intelligence committee formed in 1975 to study governmental operations, found.¹⁴ Sometimes it conveyed “distorted and exaggerated facts” to the media to support its political goals.¹⁵ Deep State sabotage is close to the type of Deep State activities that some on the right decry today.

There were many institutional reasons why Deep State abuses occurred in that era, but two stand out. First, the Deep State lacked legal regulation. Practically no statutory laws governed Deep State activities inside the United States, and intelligence agencies “simply ignored” the Constitution, concluded the Church Committee. William Sullivan told the committee that in a decade on the U.S. Intelligence Board he never once heard or asked the question, “Is this course of action which we have agreed upon lawful, is it

legal?”¹⁶ Second was the absence of transparency within the government behind walls of secrecy. Congress exercised no oversight, and senior members of Congress frequently told intelligence officials not to inform them about intelligence activities.¹⁷ There was not much more oversight within the executive branch of FBI and NSA activities, especially in the FBI, where presidents gave Hoover significant leeway to run his own ship. With no one with adverse interests watching carefully and internal responsibility blurred, abuse flourished.

The Deep State abuses of the 1950s through 1970s came to an end with their revelation in the early 1970s and with the 1976 Church Committee Report, which documented them publicly. The resulting reforms can be described as a “grand bargain.”¹⁸ The president and his intelligence bureaucracies were allowed to maintain robust surveillance and espionage capacities, including in the domestic arena. But in exchange, Congress imposed significant legal restrictions on how they collected, analyzed, and disseminated intelligence information; a bevy of lawyers (and, later, inspectors general) monitored and enforced those restrictions; domestic surveillance required a court order, including an order from a new court, the Foreign Intelligence Surveillance Court, for foreign intelligence collection; and two new committees, the Senate and House Intelligence committees, were to be kept “fully and currently informed” of all significant intelligence activities and were granted robust oversight authorities. The hope was that public oversight mechanisms

could be replicated in secret by imposing legal restrictions, enhancing internal transparency, and creating multiple channels of accountability.

THE GRAND BARGAIN WAS SUCCESSFUL IN STAMPING OUT THE POLITICAL abuses it aimed to address. In the four decades after the Church Committee, there has been no evidence that presidents and senior executive officials have used the Deep State to attack political enemies or subversive forces in the United States. Ironically, Edward Snowden's leak in 2013 of information about US signals intelligence practices confirmed this success of the grand bargain. Snowden revealed the massive scope of US signals intelligence collection at home and abroad. He also revealed a new and serious post-Church Committee problem: the rise of secret legal interpretation by executive lawyers and secret courts that can distort the meaning of public laws in ways that allow for intelligence collection against Americans that departs from public expectation.¹⁹ But Snowden also showed that the political abuses of the pre-1975 era were gone. In many thousands of pages of highly classified material about numerous domestic collection programs and practices, not one pointed to anything like the political operations of the 1970s and before.

The grand bargain's imposition of legalism, process, and internal transparency also had a significant though more ambiguous impact on Deep State sabotage of democratic official action. None of the many intelligence revelations in the last few decades reveal anything like a concerted bureaucratic effort to exercise control over politicians or democratic policies

akin to what Hoover's FBI did. One often reads that a president who betrays or fails to support intelligence agencies faces a threat of retaliation. But to the extent this has been true, it appears to be a species of typical bureaucratic resistance to presidential initiatives that cut against the bureaucracy's interests. Also, in recent years intelligence agencies have sometimes been accused of skewing the information they feed a president, an accusation that is hard for the public to assess. The point for now is that we have never returned to the days in which an intelligence bureaucracy deployed its tools to in effect blackmail or threaten to destroy democratically elected officials, and thereby control them.

But there is a large caveat to this conclusion. A form of political sabotage that the grand bargain did not stop, and indeed a practice that has grown in the years since the Church Report, is leaks (or threats of leaks) of secret government information to achieve various ends. In the sabotage scenario sketched thus far, a national security bureaucrat discloses (or threatens to disclose) secretly collected information to harm the political principal for ends deemed *abusive*. Hoover's shenanigans are an example. But a member of the Deep State can also leak secret information or threaten to do so to sabotage the political principal in ways we deem *virtuous*. A classic pre-Church Committee example is Mark Felt, the associate director of the FBI who was Bob Woodward's infamous "Deep Throat" source for the Watergate revelations. Felt worked in the FBI for over thirty years and was heavily involved in its secret illegal actions, for which he eventually was convicted. But he was also "deeply offended

that the President and his top aides ran what constituted a criminal operation out of the White House, and he risked everything to guide Woodward.”²⁰

It is sometimes hard to say precisely when and why opportunistic use of secret information to sabotage democratic leaders is deemed virtuous (Felt against the Nixon White House) as opposed to abusive (Hoover against scores of politicians). Felt was acting individually and taking personal risk, while Hoover was acting with the support of and on behalf of the FBI, and taking less personal risk. The bureaucracy as saboteur might pose a greater threat to democratic action than an individual acting alone. (It also might, in the right circumstance, be a more effective savior.) Felt might also be seen as a whistleblower who was exposing corrupt and illegal action by the government, while Hoover was an opportunist who was undermining democratic processes.

Felt’s case is relatively easy to defend because he disclosed no classified information and because he was ratting on one of the most corrupt presidencies in American history. A fuller assessment of virtuous sabotage must consider two complications. First, what if a Deep State agent leaks to expose corrupt or illegal action in the face of a criminal prohibition on the disclosure of that information? In that case the intelligence official is acting illegally and contrary to the considered views of the political branches about the importance of maintaining secrecy. Can two wrongs make a right? And second, can we trust the Deep State leaker to leak the right kind of information? How can we be sure that

the interests and judgments of Deep State leakers will, as in Felt's case, serve the national interest?

On the first question, it is pretty clear that, despite prohibition on leaks of classified information, the optimal rate of leaking such information to sabotage elected officials or their policies is not zero.²¹ The president has complete control over the secrecy stamp, and he and his subordinates sometimes deploy it opportunistically to keep illegal or otherwise wrongful action out of the public realm. When the executive branch acts in the secret world it defines for itself, it may make more mistakes than usual, and any mistakes it does make are harder to correct because the grand bargain is only a second-best solution to public transparency and accountability. Moreover, fear of leaks causes national security officials to think twice about what they do, and deters them from doing things that they should not do.

Finally, the proof is in the pudding. Leaks in the early 1970s revealed atrocious Deep State practices that led to the major reforms in the grand bargain. Numerous leaks of classified information in the last fifteen years—on matters ranging from black sites to interrogation to surveillance to drones—have disclosed practices deemed illegal or illegitimate by Congress, courts, or executive insiders, which proceeded to impose reform. In all of these cases, sabotage via Deep State leaks performed a vital corrective. This is the sense in which the Deep State's manipulation can be a savior of democratic politics: it can preserve democratic values through the revelation and correction of antidemocratic action in secret.

The objection that the government through democratic

processes has considered the matter and spoken through criminal laws that prohibit leaks of classified information turns on an inaccurate picture of US law.²² The general legal prohibitions on leaking classified information found in the century-old Espionage Act are old and full of loopholes that make many, and perhaps most, damaging leaks impossible to prosecute. Congress has considered but not closed these loopholes. Despite the recent press panic over leak investigations, the government prosecutes only a tiny fraction of leakers, and many it stays away from because they would be politically controversial.

The government is even more hands off with the press even though journalists publish much more classified information today than in the past, and with a lowered threshold of when such information is in the public interest.²³ It has never prosecuted a member of the media for publishing secret government information. It sometimes, though rarely, subpoenas journalists to assist in leak investigations, but under political pressure for restraint, the Justice Department has twice in recent years raised the hurdles to such subpoenas. A journalist in this situation can be jailed for refusing to reveal sources, but recently the Justice Department declined in a high-profile leak prosecution to force a journalist to testify against his source.²⁴ One reason the government constrains itself in punishing leakers and their publishers is that leaks of secret government information are not always an absolute bad and indeed can serve a vital function in checking a too-secretive Deep State.²⁵

To say that Deep State leaks of classified information

are sometimes justified is not to answer the second question about whether we can trust leakers to know which leaks are appropriate. Some leaks are intelligence operations by foreign adversaries. Those are viewed to be uncontroversially bad.²⁶ But even when leaks come from ostensible whistleblowers, they can be enormously costly in terms of national security harm, lost intelligence, blown sources, and significant financial investments ruined (especially when electronic surveillance techniques are disclosed).

Unfortunately, we don't have great conceptual tools for measuring these costs and benefits or for determining optimal trade-offs. The public lacks adequate information to really understand these harms, and intuitions about how to measure and trade them off vary widely. There are nonetheless plenty of reasons to think that leakers across the run of cases will lack adequate information, or proper incentives, or the right values, to get the trade-off right. Even those who see themselves as whistleblowers have many complex motivations and aren't reliable judges of when the benefits of leaks outweigh their costs. Sometimes they are right, but often they are wrong.

Some leakers, for example, misperceive the legality or legitimacy of government action. This happened with the leaks published by the *New York Times* in 2006 about how the government worked with a global banking consortium to collect financial information related to possible terrorist-related transfers. The author of the story, perhaps reflecting his source's motivation, defended it on the ground that it rested on a "largely untested legal theory" and was "argu-

ably extralegal.”²⁷ This judgment was simply wrong. The program violated no American privacy laws; it operated by administrative subpoenas pursuant to powers that Congress delegated to the president in the International Emergency Economic Powers Act.²⁸ Other times, leakers will misperceive the public interest value of the leak compared to its national security harm. We know this is so because American newspaper editors, who carry a heavy presumption in favor of publication, sometimes refuse to publish leaked classified information after weighing the value of publication against possible harms disclosed by the government.²⁹

And then there is the complicated case of Edward Snowden. Snowden was at the margins of the Deep State actor. He was technically a contractor, not a bureaucrat, although private sector growth in the intelligence area has been significant enough to approach Deep State status in terms of what the intelligence contractors do and their distinctive and persistent interests and attitudes. Like Felt but unlike Hoover, Snowden acted alone rather than on behalf of the bureaucracy. And in contrast to Felt, Snowden aimed to hold accountable not just a president but the entire intelligence community.

Snowden’s leaks can roughly be divided into two types of classified information: (1) surveillances practices inside the United States or involving American citizens, and (2) surveillance practices outside the United States involving non-US citizens. The leaks of practices in category 1 were the easier to justify because the practices were controversial under US statutory and constitutional law, were contrary

to public expectations, and sparked reforms (and broader conversations about reforms). One could even argue that Snowden's category 1 disclosures *helped* US intelligence agencies by forcing them to be more transparent, by demonstrating that despite the legal controversy they were acting with the full knowledge and support of all three branches of government, and by sparking reform that strengthened the legality and legitimacy of their domestic collection practices while barely narrowing them in practice.³⁰

By contrast, the leaks of surveillance practices conducted abroad, against non-Americans, revealed operations that were lawful and consistent with general expectations (inside the United States) about US intelligence agencies' activities abroad. 31 Tellingly, these Snowden disclosures have not sparked significant changes to US law.³² But they had a huge impact. They blew many sources and methods, caused enormous financial losses, severely strained relations with allies, and revealed to key adversaries (including China and Russia) how we monitor their activities. Snowden has justified his actions primarily on the basis of the oath he took to "support and defend the Constitution."³³ If so, he made a big mistake, since the practices he revealed did not violate the Constitution. Snowden might have been serving his oath when he leaked the Section 215 domestic metadata program, and also, perhaps, the aspects of the 702 programs (PRISM and upstream collection) that concerned US citizens. But it is hard to see how Snowden's oath to the US Constitution justified the theft and disclosure of the vast number of documents (probably more than 99 percent of

the total) in category 2 about overseas activities that did not even arguably violate the laws or Constitution of the United States.

Snowden's actions in category 2 also reveal how the leaker may have whistleblowing motivations that cannot be credited within the US political system. Although Snowden has defended his actions mostly based on his oath, he has also suggested that he was motivated by cosmopolitan values to protect the privacy rights of foreigners and a free Internet.³⁴ But this motivation is antithetical to the very idea of a national intelligence service, whose job is to collect foreign intelligence, including by electronic means. There are any number of principals that it may be proper for national security bureaucrats to serve—the president, the Constitution and laws, the American people, the bureaucracy itself. But foreign citizens and governments cannot be a legitimate principal. No country can maintain an intelligence service and credit leaking for cosmopolitan ends.

In sum to this point: First-generation Deep State threats of political abuse and of bureaucratic (as opposed to individual) sabotage of government policies for illegitimate ends seem to have dissipated after the grand bargain. But leaks by individual officials have continued and indeed proliferated with the growth in the secrecy system that the Deep State manages. Although we don't have great metrics for assessing these leaks in every case, there are examples when the leaks serve valuable ends on balance and other examples when they don't. Leakers cannot be trusted to get this calculus right. But nor can the government be trusted to sort out and

regulate Deep State leakers in ways that clamp down on the bad while maintaining the good—even assuming the government had the power to stop the leaks, which it doesn't, except at the margins. And so the US government muddles through with a massive secret intelligence bureaucracy that collects unfathomable amounts of information in the domestic realm but is unable to control its leakers, who for better or for worse possess enormous discretion to use the secretly collected information to sabotage persons, policies, and initiatives they do not like.

THE DEEP STATE HAS BEEN BLAMED FOR MANY THINGS SINCE DONALD Trump became president, including by the president himself (though he has not yet used the term *Deep State*).³⁵ Trump defenders have used the term *Deep State* promiscuously to include not just intelligence bureaucrats, but a broader array of connected players in other administrative bureaucracies, in private industry, and in the media. I will continue to focus narrowly on the intelligence bureaucracies that conduct and use information collected secretly in the homeland. There is significant evidence that the Deep State so understood—either as part of a concerted movement, or via individuals acting more or less independently—has used secretly collected information opportunistically and illegally to sabotage the president and his senior officials. The hard questions are whether this sabotage is virtuous or abusive, whether we can tell, and what the consequences of these actions are.

Since Trump was elected, unusually sensitive leaks of

intelligence information designed to discredit him and his senior leadership have poured forth from current and former intelligence officials in the Deep State. The first major one, in February 2017, concerned a court-approved NSA wiretap of a phone conversation between Russia's ambassador to the United States, Sergey Kislyak, and incoming National Security Advisor Michael Flynn that concerned, among other things, the possible removal of Russia sanctions imposed by President Obama.³⁶ Flynn had denied that the men discussed sanctions, and the leak revealing his lie led to his resignation.³⁷ Another major leak concerned communications intercepts during the campaign of Russian government officials discussing potentially "derogatory" information about Trump and top campaign aides.³⁸ Other leaks in this vein included intercepts of Russian officials claiming they could influence Trump through Flynn;³⁹ of Kislyak supposedly informing Moscow that he discussed campaign-related issues with then-Senator Jeff Sessions;⁴⁰ and of Kislyak discussing in a communication to Moscow that Trump's son-in-law, Jared Kushner, wanted to communicate via a secure channel.⁴¹

These leaks probably mark the first time ever that the content of foreign intelligence intercepts aimed at foreign agents that swept up US person information was leaked.⁴² They clearly aimed to damage US persons—ones who happen to also be senior US government officials.⁴³ They were unlawful and, beyond that, they violated two until-now strict taboos about leaks—first on revealing the content of foreign intelligence information collected through elec-

tronic surveillance, and second, on revealing the content of incidentally collected information about American citizens. The leaks were at least in some respects more damaging than Snowden's leaks, which involved information about *programs* but not discrete conversations that violated the privacy of the communicants involved and did not contain means and methods of intelligence collection at the level of granularity of the Trump-era leaks.⁴⁴

Many people, including many who are not in the Trump camp, have interpreted these leaks to violate a third taboo by marking a return to the Hoover-era FBI's use of secretly collected information to sabotage elected officials with adverse political interests.⁴⁵ The comparison is plausible in light of the extensive efforts soon after the election to encourage the bureaucracy, including the intelligence bureaucracy, to resist the Trump administration, and the evidence that there was in some agencies such resistance.⁴⁶ We don't know if the leaks have come from uncoordinated Deep State individuals or via coordinated action akin to the type Hoover engaged in from the top of the FBI. (It might be something in between.) Moreover, while Hoover did many awful things in quiet, neither during his reign nor at any other time in American history have we seen such a profusion of sensitive leaks from the Deep State with such an overtly political aim to bring down senior leadership. Mark Felt's leaks may perhaps be the equivalent, but as noted above, they were not unlawful, did not involve so many people, and did not involve the most sensitive and guarded classified information that the government possessed.

The Felt example raises the possibility that the anti-Trump leaks, on their face political and unprecedented, were nonetheless justified whistleblowing, akin perhaps to Felt's leaks or to leaks about illegal surveillance programs or about illegal interrogation practices at CIA black sites. Put another way, it is possible that the benefits of the leaks, considered narrowly, outweigh the evil inherent in breaching the first two taboos above. The situation the leaks are a response to is itself extraordinary to the point of unprecedented. The acting attorney general of the United States, Sally Yates, believed that Flynn, the new National Security advisor, was compromised by the Russians and vulnerable to blackmail, and so warned the White House, which seemed to take no steps in response to the information.⁴⁷ More broadly, a number of very odd circumstances suggested unusual and potentially corrupt connections between the Trump campaign and administration and the Russian government, about which the FBI had been conducting a counterintelligence investigation since the summer of 2016. All of this came in the context of the unprecedented Russian DNC hack designed, our intelligence agencies tell us, to help Donald Trump win the election. And then once in office, President Trump himself engaged in vicious and in many instances false attacks on the intelligence community and Justice Department investigators.

Do these unprecedented circumstances justify the unprecedented Deep State leaks? As I write in September 2017, we don't have enough information, or adequate consensus about how to judge illegal leaks, to assess costs and ben-

efits here. The lines crossed by the Deep State leaks against Trump were thought to be absolute ones until 2017. But we have never faced a situation where the National Security advisor, and perhaps even the president of the United States, presented a credible counterintelligence threat involving one of our greatest adversaries. Perhaps the facts will develop to give us enough clarity about the Russia-Trump connections to be able to make a better judgment along the lines of the judgment that history has made about Mark Felt's leaks. Though perhaps we will never have adequate informational clarity, and thus won't be able to reach consensus on whether the leaks were justified.

But however those matters develop, the whole ordeal has already done great damage to both the presidency and the national security bureaucracy. One important question going forward is whether the taboo on leaking the content of foreign intelligence collections is broken, and to what degree, and what the consequences of that breach are. As Deep State officials get a taste for the power that inheres in the selective revelation of such information, and if the leaks are not responded to with severe punishments, it is easy to imagine the tools that brought down Flynn being used in other contexts by national security bureaucrats with different commitments and interests.

Even the most severe critics of President Trump should worry about this subtle form of antidemocratic abuse. As Adam Klein asked: "If you welcomed these leaks because they hastened Flynn's departure, would you be comfortable with selective leaks of U.S.-person intercepts becoming a

routine weapon in political catfights? With an unelected ‘permanent state’ wielding this power to undermine or intimidate politically accountable officials? With political appointees using it to sideline rivals or attack political opponents?”⁴⁸ It was very hard and very damaging to eliminate the various forms of surveillance abuse that prevailed in the pre-Church days. The actions of the Deep State in the early Trump days, exacerbated by the president’s own actions, threaten to take us back to that time.

The big loser in all this will probably be the national security bureaucracy itself and, to the extent it is weakened, the security of the American people. Even if it turns out that Flynn and others close to Trump were in the bag for the Russians, many people will for a long time view the anti-Trump leaks as political abuse of intelligence to harm political enemies. This perception will be deepened by the Trump administration’s relentless and often false attacks on the integrity of the intelligence community, including its false suggestion that the original collection that incidentally captured Flynn’s communications, as opposed to the leaks of such information, was illegitimate.

The Flynn and related leaks didn’t just violate the law—they violated the core commitment the intelligence community made in the grand bargain not to politicize, or appear to politicize, the use of surveillance tools or the fruits of their use. The whole intelligence collection system—which has an importance that far transcends its undoubtedly large importance in this discrete context—is vulnerable here for the simple reason that the intermixture of politics with intel-

ligence collection is the intelligence system's Achilles' heel.⁴⁹ If surveillance comes to be seen through a domestic political lens, with domestic political winners and losers, the intelligence community will have a very hard time acting with needed public credibility. And that in turn means that it will have a harder time doing what it needs to do to keep us safe.

NOTES

1. Hans Morgenthau, "The Impact of the Loyalty-Security Measures on the State Department," 11 *Bulletin of the Atomic Scientists* 134 (1955); Exec. Order No. 10,450, 18 Fed. Reg. 2489 (April 27, 1953).
2. Ibid.
3. Ibid. For a later and broader version of a similar idea, see Michael J. Glennon, *National Security and Double Government* (2014).
4. David Remnick, "There Is No Deep State," *The New Yorker*, March 20, 2017, at [page #]; "What is the 'deep state'?", *The Economist*, March 9, 2017, at [page #].
5. See Julie Hirschfeld Davis, "Rumblings of a 'Deep State' Undermining Trump? It Was Once a Foreign Concept," *New York Times*, March 6, 2017; Steven A. Cook, "The Deep State Comes to America," *Foreign Policy*, February 24, 2017.
6. For broader definitions of *Deep State* that contain critiques of the concept from which I have learned much, see Rebecca Ingber, "The 'Deep State' Myth and the Real Executive Branch Bureaucracy," *Lawfare* (June 14, 2017), <https://lawfareblog.com/deep-state-myth-and-real-executive-branch-bureaucracy>; Jon D. Michaels, "Trump and the 'Deep State,'" 96 *Foreign Affairs* 52 (2017).
7. The FBI's precursor, the Bureau of Investigation, was created in 1908. Hoover led the BOI beginning in 1924.
8. See generally US S. Church Committee, *Intelligence Activities and the Rights of Americans*, S. Rep. No. 94-755 (1976).
9. Id.
10. I follow John Brehm in using the term *sabotage* to describe an agent who acts contrary to the interests or instructions of the

principal because she has divergent preferences. See John Brehm and Scott Gates, *Working, Shirking, and Sabotage: Bureaucratic Response to a Democratic Public* (Ann Arbor: University of Michigan Press, 1999); see also Jacob Gersen and Adrian Vermeule, *Delegating to Enemies*, 112 *Columbia Law Review* 2193 (2012).

11. A related move was to feed the president tendentious information to influence his decision in a particular direction.
12. Ronald Kessler, *The Secrets of the FBI* 38 (New York: Crown Forum, 2012).
13. See generally U.S. S. Church Committee.
14. Church Commission [US S. Church Comm., supra note 6.]
15. Id.
16. Id.
17. See Jack Goldsmith, *Power and Constraint* 83–84 (New York: W.W. Norton & Co., 2012).
18. Goldsmith, supra note 15, at [page #].
19. See Jack Goldsmith, “The Irrelevance of Prerogative Power, and the Evils of Secret Legal Interpretation,” in *Extra Legal Power and Legitimacy: Perspectives on Prerogative* (Clement Fatovic and Benjamin A. Kleinerman, editors, 2013); Jack Goldsmith, “Toward Greater Transparency of National Security Work” (remarks delivered at ODNI Conference on May 6, 2015), <http://jackgoldsmith.org/toward-greater-transparency-of-national-security-legal-work/>.
20. Remnick, “There Is No Deep State.”
21. See David E. Pozen, “The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information,” 127 *Harvard Law Review* 512, 545 (2013). I draw here on Pozen and my discussion in *Power and Constraint* at ____.
22. See Pozen, supra note 19, at ____; Goldsmith, *Power and Constraint*, supra note 15, at ____.
23. See Jack Goldsmith, “The Latest Erosion of Norms Against Publishing Classified Information,” *Lawfare*, April 28, 2015, <https://lawfareblog.com/latest-erosion-norms-against-publishing-classified-information>.
24. See Matt Apuzzo, “Times Reporter Will Not Be Called to Testify in Leak Case,” *New York Times*, January 12, 2015.

25. And there are of course other reasons for constraint, including First Amendment concerns, political backlash, graymail, and the like.
26. But there are complications even here. What if Snowden (in his “virtuous” domestic whistleblowing activities), or Mark Felt (in bringing down Nixon), was acting on behalf of a foreign power? That is, what if a foreign intelligence agent leaks US government information that is *motivated* to harm the US government but that in fact *results* in virtuous, democracy-enhancing consequences? I explore these complications, which will become more pronounced in a world in which journalists receive secure anonymous leaks, in Jack Goldsmith, “Journalism in the Doxing Era: Is Wikileaks Different from the New York Times?”, *Lawfare*, January 16, 2017, <https://www.lawfareblog.com/journalism-doxing-era-wikileaks-different-new-york-times>.
27. See Eric Lichtblau, *Bush’s Law: The Remaking of American Justice* (New York: Pantheon Books 2008).
28. Jack Goldsmith, “Secrecy and Safety,” *New Republic*, August 12, 2008.
29. Goldsmith, *Power and Constraint*, supra note 15, at ____.
30. Jack Goldsmith, “Three Years Later: How Snowden Helped the U.S. Intelligence Community,” *Lawfare*, June 6, 2016, <https://www.lawfareblog.com/three-years-later-how-snowden-helped-us-intelligence-community>.
31. See, e.g., James Warren, “Snowden and the NSA: Behind the Scenes,” *U.S. News & World Report*, May 18, 2016, <https://www.usnews.com/opinion/articles/2016-05-18/civil-liberties-and-national-security-expert-on-edward-snowden-and-the-nsa> (interview with Geoffrey Stone).
32. In response to the fallout from Snowden, President Obama issued PPD-28 to address concerns about privacy protections for non-US citizens abroad, but this document did not bring material changes to US law or practice. See Presidential Policy Directive—Signals Intelligence Activities, January 17, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities>. The broader point is that Snowden’s leaks of information about surveillance programs outside the United States directed at non-US persons cannot be characterized as whistleblowing to actions illegal under US law.

33. See Barton Gellman, "Edward Snowden, after months of NSA revelations, says his mission's accomplished," *Washington Post*, December 23, 2013, at https://www.washingtonpost.com/world/national-security/edward-snowden-after-months-of-nsa-revelations-says-his-missions-accomplished/2013/12/23/49fc36de-6c1c-11e3-a523-fe73f0ff6b8d_story.html?utm_term=.afb795ce3bb1; Amy Davidson Sorkin, "Did Edward Snowden Break His Oath?", *New Yorker*, January 5, 2014, <http://www.newyorker.com/news/amy-davidson/did-edward-snowden-break-his-oath>.
34. See, e.g., Glenn Greenwald et al., "Edward Snowden: the whistleblower behind the NSA surveillance revelations," *The Guardian*, June 11, 2013 ("I'm willing to sacrifice all of that because I can't in good conscience allow the US government to destroy privacy, internet freedom and basic liberties for people around the world with this massive surveillance machine they're secretly building."); James Bamford, "Edward Snowden: The Untold Story," *Wired*, August 2014 (explaining Snowden's concerns about overbroad US surveillance in China).
35. President Trump did, however, retweet a reference to the "Deep State." See Julia Manchester, "Trump promotes Hannity's 'deep state' monologue," *The Hill* (June 16, 2017), <http://thehill.com/media/338241-trump-shares-hannity-tweet-on-monologue-calling-for-leakers-to-be-jailed>.
36. Greg Miller et al., "National security adviser Flynn discussed sanctions with Russian ambassador despite denials, officials say," *Washington Post*, February 9, 2017, https://www.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6-ee11-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.a2ea59c0dd85.
37. Maggie Haberman et al., "Michael Flynn Resigns as National Security Adviser," *New York Times*, February 13, 2017, <https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html>.
38. Pamela Brown et al., "Sources: Russians discussed potentially 'derogatory' information about Trump and associates during campaign," CNN, May 30, 2017, <http://www.cnn.com/2017/05/30/politics/russians-trump-campaign-information/index.html>.

39. Gloria Borger et al., “Russian officials bragged they could use Flynn to influence Trump,” CNN, May 19, 2017, <http://www.cnn.com/2017/05/19/politics/michael-flynn-donald-trump-russia-influence/index.html>.
40. Adam Entous, Ellen Nakashima, and Greg Miller, “Sessions discussed Trump campaign-related matters with Russian ambassador, U.S. intelligence intercepts show,” *Washington Post*, July 21, 2017, https://www.washingtonpost.com/world/national-security/sessions-discussed-trump-campaign-related-matters-with-russian-ambassador-us-intelligence-intercepts-show/2017/07/21/3e704692-6e44-11e7-9c15-177740635e83_story.html?utm_term=.729c2d9e76ab.
41. Ellen Nakashima, Adam Entous, and Greg Miller, “Russian ambassador told Moscow that Kushner wanted secret communications channel with Kremlin,” *Washington Post*, May 26, 2017, https://www.washingtonpost.com/world/national-security/russian-ambassador-told-moscow-that-kushner-wanted-secret-communications-channel-with-kremlin/2017/05/26/520a14b4-422d-11e7-9869-bac8b446820a_story.html?utm_term=.127b7a5196d6.
42. The closest precedent I can find is when Bill Gertz in 1999 reported that “national security intercepts indicated that Chinese secret agents had notified China that the American bombing of the Chinese embassy in Belgrade during the NATO war on Yugoslavia had not been accidental, as the United States claimed, but had been deliberate.” See Jack Nelson, “U.S. Government Secrecy and the Current Crackdown on Leaks,” Shorenstein Working Paper Series 24 (2002), https://shorensteincenter.org/wp-content/uploads/2012/03/2003_01_nelson.pdf. These were foreign intelligence intercepts, but they might not have been FISA-approved and they did not reveal US person information.
43. Gloria Borger et al., “First on CNN: Russian officials bragged they could use Flynn to influence Trump, sources say,” CNN, May 19, 2017, <http://www.cnn.com/2017/05/19/politics/michael-flynn-donald-trump-russia-influence/index.html> (“Russian officials bragged in conversations during the presidential campaign that they had cultivated a strong relationship with former Trump adviser retired Gen. Michael Flynn and believed they could use

him to influence Donald Trump”); Jim Sciutto et al., “British intelligence passed Trump associates’ communications with Russians on to US counterparts,” CNN, April 14, 2017, <http://www.cnn.com/2017/04/13/politics/trump-russia-british-intelligence/index.html> (“British and other European intelligence agencies intercepted communications between associates of Donald Trump and Russian officials and other Russian individuals during the campaign and passed on those communications to their US counterparts, US congressional and law enforcement and US and European intelligence sources tell CNN.”); Shane Harris, “Russian Officials Overheard Discussing Trump Associates Before Campaign Began,” *Wall Street Journal*, July 12, 2017, https://www.wsj.com/article_email/russian-officials-overheard-discussing-trump-associates-before-campaign-began-1499890354-lMyQjAxMTI3MjE5MjExMzI0Wj/ (“Investigators are re-examining conversations detected by U.S. intelligence agencies in spring 2015 that captured Russian government officials discussing associates of Donald Trump. . . . In some cases, the Russians in the overheard conversations talked about meetings held outside the U.S. involving Russian government officials and Trump business associates or advisers”); Michael Schmidt et al., “Trump Campaign Aides Had Repeated Contact With Russian Intelligence,” *New York Times*, February 14, 2017, <https://www.nytimes.com/2017/02/14/us/politics/russia-intelligence-communications-trump.html> (“The intercepted calls are different from the wiretapped conversations last year between Michael T. Flynn, Mr. Trump’s former national security adviser, and Sergey I. Kislyak, Russia’s ambassador to the United States.”); cf. Ken Rudin, “What to Make of the Alleged Jane Harman/AIPAC Quid Pro Quo,” NPR, April 20, 2009, available at http://www.npr.org/sections/politicaljunkie/2009/04/alleged_harmanaipac_chat.html.

44. Timothy H. Edgar, *Beyond Snowden: Privacy, Mass Surveillance, and the Struggle to Reform the NSA* (Brookings Institution Press, 2017).
45. See Adam Klein, “It’s Not About Mike Flynn,” *Lawfare*, February 17, 2017, <https://www.lawfareblog.com/its-not-about-mike-flynn>; Eli Lake, “The Resistance Cheers Tactics Trump Will Likely Use Against Them,” *Bloomberg*, March 17, 2017, <https://>

- www.bloomberg.com/view/articles/2017-03-17/the-resistance-cheers-tactics-trump-will-likely-use-against-them; Timothy Edgar, "Michael Flynn May Want to Call the ACLU," *Lawfare*, February 14, 2017, <https://lawfareblog.com/michael-flynn-may-want-call-aclu>.
46. On calls for resistance, see Oona Hathaway and Sarah Weiner, "Dissenting from Within the Trump Administration," *Just Security*, January 17, 2017; Jennifer Nou, "Bureaucratic Resistance from Below," *Notice & Comment*, November 16, 2016; Evan Osnos, "Resisting Trump from Inside the Government," *New Yorker*, November 21, 2016. On the early evidence, see Justin Caffier, "How Federal Civil Servants Are Waging Bureaucratic War Against Trump," *Vice News*, February 13, 2017; Juliet Eilperin et al., "Resistance from within: Federal workers push back against Trump," *Washington Post*, January 31, 2017; Gregory Krieg, "Going rogue: Bureaucrats find ways to resist Trump," CNN, February 2, 2017; Andrew Restuccia et al., "Federal workers turn to encryption to thwart Trump," *Politico*, February 2, 2017; Michael D. Shear & Eric Lichtblau, "'A Sense of Dread' for Civil Servants Shaken by Trump Transition," *New York Times*, February 11, 2017; Abigail Tracy, "An Anti-Trump Resistance Movement Is Growing Within the U.S. Government," *Vanity Fair* (online version), February 1, 2017.
 47. Matthew Rosenberg, "6 Takeaways from Monday's Senate Hearing on Russia," *New York Times*, May 8, 2017, <https://www.nytimes.com/2017/05/08/us/politics/sally-yates-james-clapper-russia-hearing.html>.
 48. See Klein, *supra* note 36.
 49. Jack Goldsmith and Benjamin Wittes, "The 'Grand Bargain' at Risk: What's at Stake When the President Alleges Politics in Intelligence," *Lawfare*, April 4, 2017, <https://www.lawfareblog.com/grand-bargain-risk-whats-stake-when-president-alleges-politics-intelligence>.

